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No. 10-137

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FIRST BANK,

Petitioner

v.

DJL PROPERTIES, LLC, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DJL PROPERTIES, LLC

BERNARD YSURSA
Counsel of Record
12 West Lincoln Street
Belleville, Illinois 62220
618-235-3500
bjy@cooklawoffice.com

THOMAS R. YSURSA
5111 West Main Street
Belleville, Illinois 62226
618-235-0020

Counsel for Respondent, DJL Properties, LLC

232489

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does the Class Action Fairness Act of 2005 (CAFA), (Pub.L.No.109-2, 119 Stat. 4 (2005), allow an original plaintiff named as a counterclaim defendant to remove a counterclaim to federal court?

COMPLETE LISTING OF PARTIES

First Bank

DJL Properties, LLC

Jonathon E. Guthrie

Lisa M. Guthrie

Metro East Sanitary District

American Bottoms Regional Wastewater Treatment Facility

Land Lincoln Securities, LLC

Village of Sauget

Ravens Securities, Inc.

St. Clair County Trustee

VI, Inc.

RULE 29.6 STATEMENT

DJL Properties, LLC is a member Illinois limited liability corporation with Lisa Guthrie and Jonathon Guthrie as the members. No parent or publicly held company owns 10% or more of the corporation's stock.

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JURISDICTION

Respondent, DJL Properties, LLC, respectfully submits that this Supreme Court lacks jurisdiction over this appeal. Normally 28 U.S.C. §1254(1) provides this Supreme Court jurisdiction to entertain a petition for a *writ of certiorari*; however, this case involves an appeal of a class action counterclaim remand order. Historically remand orders are not reviewable per 28 U.S.C. §1447(d) which states:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to *section 1443* of this title shall be reviewable by appeal or otherwise. See 28 U.S.C. §1447(d).

CAFA changed this and allowed courts of appeal to review class action remand orders pursuant to 28 U.S.C. §1453(c)(1) which provides:

> *Section 1447* shall apply to any removal of a case under this section, except that notwithstanding *section 1447(d)*, a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action . . . See 28 U.S.C. §1453(c)(1).

While CAFA provided a court of appeals the right to review remand orders under §1453(c)(1); it did not grant that jurisdiction to this Supreme Court to review

remand orders. Respondent also respectfully suggests that the well pleaded counterclaim fails to demonstrate any basis for federal jurisdiction that would subject the remand orders to appeal under §1453(c)(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in this case but omitted from those listed in the Petition for a *Writ of Certiorari*, 28 U.S.C. §1447(d). The relevant portion of 28 U.S.C. §1447 is reproduced in the Respondent, DJL Properties, LLC's Appendix.

STATEMENT OF THE CASE

The issue presented in this case is whether the Seventh Circuit Court of Appeals, consistent with the Ninth Circuit Court of Appeals and Fourth Circuit Court of Appeals, erred in upholding the near-canonical holding of *Shamrock Oil & Gas Corp. v. Sheets*, (313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941)), that a counterclaim defendant cannot remove an action to federal court. Specifically the issue presented is whether CAFA changed the *Shamrock* rule so that a litigant that files an action in state court as a "plaintiff" can remove a counterclaim filed against it to federal court.

A. Procedural History

This case involves the removal of two lawsuits from Illinois State Court to the United States District Court for the Southern District of Illinois. Plaintiff/ Counterclaim-Defendant, First Bank, filed a suit for

foreclosure, (Illinois Twentieth Judicial Circuit Case No. 09-CH-506), and a suit for breach of contract based upon the commercial guarantees securing the loans that are the subject of the foreclosure lawsuit, (Illinois Twentieth Judicial Circuit Case No. 09-L-238). Both lawsuits were directed primarily against Defendants, Jonathon Guthrie, and Lisa Guthrie, and Defendant/ Counterclaim-Plaintiff, DJL Properties, LLC, (the foreclosure case does name additional parties due to the requirements of Illinois foreclosure law). On October 20, 2009, Counterclaim-Plaintiff, DJL Properties, LLC, filed Class Action Counterclaims against First Bank in both state court cases.[1] First Bank removed both actions on November 19, 2009 asserting jurisdiction pursuant to CAFA, 28 U.S.C. §1453. The District Court in fulfillment of its duty to ensure proper jurisdiction issued an order on December 7, 2009 directing the parties to brief the issue of jurisdiction. Both parties briefed the issue and on January 27, 2010 Judge Gilbert remanded Case No. 09-CV-0970-JPG to state court. See Petitioner's Appendix 8a. Judge Reagan remanded Case No. 09-CV-0969-MJR to State Court two days later on January 29, 2010. See Petitioner's Appendix 6a.

First Bank filed two Petitions for Permission to Appeal the Remand Order pursuant to 28 U.S.C. §1453(c) with the United States Seventh Circuit Court

1. First Bank makes a point to mention that the Class Action Counterclaims were filed "Approximately four months later, without leave of court and without having filed an answer. . ." See Petition for a *Writ of Certiorari* pp. 2. It should be noted that such a procedural issue is not relevant to the issue before this Supreme Court but to clarify the issue the State Court has since deemed the Counterclaims as filed. Furthermore, First Bank did not object or move to strike the filing of the Counterclaims.

of Appeals. On March 24, 2010, the Seventh Circuit granted the Petitions for Permission to Appeal and simultaneously issued an order denying the appeals. See Petitioner's Appendix 1a; *First Bank v. DJL Properties, LLC.*, 598 F.3d 915, 918 (7th Cir. 2010). On April 7, 2010 First Bank filed a Petition for Rehearing and Rehearing En Banc. The Petition for Rehearing and Rehearing En Banc was denied on April 22, 2010. See Petitioner's Appendix 18a. First Bank filed its Petition for a *Writ of Certiorari* with this Supreme Court on July 20, 2010.

B. Factual Background

The claims asserted in the class action counterclaims against First Bank involve First Bank overcharging Counterclaim-Plaintiff interest in violation of the Promissory Note between First Bank and Counterclaim-Plaintiff. The Counterclaim asserts breach of contract and Illinois statutory violations. The actual facts of the allegations are not at issue in this Petition for a *Writ of Certiorari*. The sole issue in this Petition for a *Writ of Certiorari* is whether CAFA permits a plaintiff/counterclaim-defendant to remove a class action counterclaim.[2]

The essential facts relevant to the issue raised in this Petition for a *Writ of Certiorari* are simple. First Bank voluntarily elected to sue Defendant/Counterclaim-Plaintiff in two separate lawsuits in state court. The

2. Counterclaim-Plaintiff does not take a position on whether the other elements of CAFA jurisdiction exist, i.e. amount in controversy etc., as the sole issue raised by this Petition is whether a plaintiff/counterclaim-defendant may remove a class action counterclaim under CAFA.

Promissory Note, Mortgage, and Commercial Guaranties relevant to this action all contain essentially the same venue clause: "If there is a lawsuit [Borrower] [Grantor] [Guarantor], agrees upon Lender's request to submit to the jurisdiction of the courts of St. Clair County, State of Illinois." Counterclaim-Plaintiff filed class action counterclaims in both state court cases. First Bank removed both actions to federal court citing CAFA jurisdiction based solely on the class action counterclaims.

SUMMARY OF ARGUMENT

This Supreme Court should deny the Petition for a *Writ of Certiorari* for three reasons. First, CAFA did not grant this Supreme Court jurisdiction to entertain an appeal of a remand order. Second, the Seventh Circuit Court of Appeals correctly held that CAFA did not change the definition of "defendant" to include a counterclaim-defendant. In support of this conclusion the Seventh Circuit cited the Fourth Circuit opinion in *Palisades Collections, LLC v. Shorts*, (552 F3d 327 (4th Cir. 2008)), and the Ninth Circuit opinion in *Progressive West Insurance Co. v. Preciado*, (479 F3d 1014 (9th Cir. 2007)). The Seventh Circuit correctly reasoned that the text of §1453(b) does not grant a counterclaim-defendant the right to remove a class action counterclaim. The Seventh Circuit held that Congress, armed with full knowledge of the definition of "defendant" under the removal provisions, failed to insert appropriate language to expand the definition of "defendant" in the removal provisions to include a counterclaim-defendant. Third, First Bank has failed to establish that this matter raises an issue of national importance that requires this

Supreme Court to settle the state of the law as there is no dispute as to the state of the law.

REASONS FOR DENYING THE PETITION

A. The Seventh Circuit Opinion Is Correct

As Chief Judge Easterbrook eloquently held in his opinion "The word "defendant" in § 1453(b) means what the word "defendant" means elsewhere in Chapter 89- and, as *Shamrock Oil* held, that word does not include a plaintiff who becomes a defendant on a counterclaim." See Petitioner's Appendix 5a; *First Bank v. DJL Properties, LLC.*, 598 F.3d at 918. The Seventh Circuit correctly held that CAFA does not authorize removal in this case for the following reasons: (1) two other circuit courts of appeal have correctly held the same; (2) the word "defendant" must be given consistent meaning between the removal provisions; (3) the time tested meaning of "defendant" was known to Congress and if the legislature had intended to change the meaning it could have included language indicating such; and (4) to reach the conclusion proposed by First Bank would require the judiciary to guess as to the intent of members of Congress in the final legislation.

Judge Easterbrook noted that two other Circuit Courts of Appeal, the Fourth Circuit and the Ninth Circuit, have reached the same conclusion as the Seventh Circuit on the issue of counterclaim removal. In the case of *Palisades Collections, LLC v. Shorts*, (552 F.3d 327), the Fourth Circuit provided a detailed analysis of the issue of whether a counterclaim-defendant may remove an action under 28 U.S.C. §1453. In *Palisades* the

original plaintiff, Palisades Collections sued Shorts in West Virginia State Court. Shorts countersued Palisades. Approximately a year after the counterclaim, Shorts filed an amended counterclaim adding AT&T Mobility, ("ATTM"), as an additional counterclaim-defendant. ATTM then removed the action to federal court citing CAFA. The original plaintiff, Palisades, never attempted to remove. See *Palisades*, 552 F.3d at 329. The Fourth Circuit first examined whether the case was removable under the general removal statute, 28 U.S.C. §1441. The Court concluded that an additional counterclaim-defendant could not remove based upon the nearly seventy (70) years of precedence since *Shamrock Oil*. See *Palisades*, 552 F.3d at 332-34. The Fourth Circuit then addressed whether CAFA permits removal under 28 U.S.C. §1453(b). The Court concluded that it did not. See *Palisades*, 552 F.3d at 334-36. In reaching its conclusion the Fourth Circuit found that the word "defendant" as contained in §1453(b) has the same meaning as "defendant" found in the other removal provisions, which is consistent with the almost seventy (70) years of precedence since *Shamrock Oil*.

First Bank cites the dissent in *Palisades* as the reasoning this Supreme Court should adopt in allowing removal. In the dissent Judge Niemeyer argues that the insertion of the adjective "any" in §1453(b) changes the meaning of the noun "defendant". See *Palisades*, 552 F.3d at 339. Judge Niemeyer refers to the definition of the adjective "any" as being expansive and the article "the" as being restrictive. See *Palisades*, 552 F.3d at 340. Judge Niemeyer concludes that the insertion of the word "any" demonstrates the Congressional intent to permit removal by a counterclaim-defendant. See *Palisades*, 552 F.3d at 339.

Judge Easterbrook did not ignore the inclusion of the word "any" in §1453(b) but rather considered the effect of its inclusion. Judge Easterbrook wrote that "'Any' is inclusive, to be sure, but the word that it modifies remains 'defendant'-which First Bank is not, under *Shamrock Oil*." See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. Judge Easterbrook concluded §1453(b) inserted two references to "any" in order to address two barriers to removal that CAFA was drafted to eliminate and noted that an examination of the context of the two uses of "any" in §1453(b) demonstrates this intention. See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917.

The first barrier CAFA was intended to bring down was that a home-state defendant cannot remove an action from its home-state court. §1453(b) states that class action may be removed in according with §1446 "without regard to whether any defendant is a citizen of the State in which the action is brought . . ." See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. Judge Easterbrook correctly notes that the context of the first "any" in §1453(b) is in relation to the citizenship of the defendant. See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. This context is ignored by First Bank and the dissent in *Palisades*. The second "any" in §1453(b) is included in the following phrase ". . . except that such action may be removed by any defendant without the consent of all defendants." See 28 U.S.C. §1453(b). This "any" is intended to negate the rule of consent of all defendants in order to allow a lawsuit to be removable as articulated in *Chicago Rock Island & Pacific Ry. v. Martin*, (178 U.S. 245, 20 S.Ct. 854, 44 L.Ed. 1055 (1900)). Judge Easterbrook again notes the

context of "any" and finds that the second "any" was inserted with the specific purpose of eliminating the *Martin* barrier to removal for class actions. See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917. Judge Easterbrook concludes that the purpose of the two references to "any" in §1453(b) by writing: "Neither instance of the word 'any' implies that 'defendant' means something different in §1441(b) and §1453(b)". See Petitioner's Appendix 4a; *First Bank*, 552 F.3d at 917.

Prior to *Palisades* and before this Supreme Court denied certiorari in that case, (see *AT&T Mobility LLC v. Shorts*, ___ U.S. ____,129 S.Ct. 2826, 174 L.Ed.2d 553 (2009)), the Ninth Circuit Court of Appeals addressed the question of whether CAFA allows for removal by a counterclaim defendant. In *Progressive West Insurance Co. v. Preciado*, (479 F.3d 1014), the Ninth Circuit was faced with an issue wherein the original plaintiff removed an action to federal court due to the defendant filing a class action counterclaim. See *Progressive West Insurance*, 479 F.3d at 1014. While the Court found that CAFA did not apply because the action in question preceded the enactment of CAFA, the Court specifically held that even if CAFA applied Congress did not change the near canonical rule of *Shamrock Oil* through silence. Judge Ikuta wrote:

> Nor can we accept Progressive's invitation to read CAFA liberally as making a *sub silentio* exception to *Shamrock*. We have declined to construe CAFA more broadly than its plain language indicates. *See Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir.2006) (per curiam). "Faced with statutory silence ..., we presume

> that Congress is aware of the legal context in which it is legislating." *Id.* at 683-84. This presumption is especially appropriate here, where "[t]he legal context in which the 109th Congress passed CAFA into law features a longstanding, near-canonical rule" that a state plaintiff forced to defend on the basis of a cross-complaint is without authority to remove. *See id.* at 684." See *Progressive West Insurance*, 479 F.3d at 1018.

An examination of the origin and evolution of the definition of "defendant(s)" in the removal statute establishes that "defendant" means the original named defendant(s) and not a plaintiff/counterclaim-defendant. This principle of federal jurisdiction was first established in 1867 when the Supreme Court interpreted the term "defendant" contained in the first removal statute as meaning the original named defendant and not a plaintiff that subsequently becomes a counterclaim-defendant. See *West v. Aura City*, 73 U.S. 139, 142 (1867) ("The right of removal is given only to a defendant who has not submitted himself to that jurisdiction, not to an original plaintiff in a state court who, by resorting to that jurisdiction, has become liable under the state laws to a cross-action."). This principle became further embedded in the law of removal jurisdiction after Congress expanded removal jurisdiction to permit either a plaintiff or defendant to remove when Congress amended the removal statute substituting the phrase "either party" for the term "defendant"[3] and then later

3. Act of Mr. 3 1875 ch. 137 §2, 18 Stat. 470 (1875) (permitting removal by "either party, or any one or more to the plaintiffs or defendants...").

reversed this amendment by substituting the phrase "defendant or defendants" in the Act of 1887 for the phrase "either party"[4]. The phrase "defendant or defendants" eventually migrated into 28 U.S.C. §71 which was the immediate predecessor of the current removal statute, 28 U.S.C. 1441(a). See *Shamrock Oil*, 313 U.S. at 104-05, 61 S.Ct. at 870-71, 85 L.Ed. 1214.

In the *Shamrock* decision, this Supreme Court confirmed that the term "defendant(s)" contained in the removal statute, 28 U.S.C. §71, means exactly what is says and empowered only the original named defendant(s) with the right to remove even if a jurisdictionally sufficient counterclaim is filed. See *Shamrock Oil*, 313 U.S. at 106-07, 61 S.Ct. at 871-72, 85 L.Ed. 1214. This Supreme Court found of "controlling significance" to the fact that Congress not only knew it could expand removal jurisdiction to include plaintiffs by substituting the phrase "either party" for the term "defendant(s)" in the removal statute, and actually did so previously in an amendment to the removal statute. See *Shamrock Oil*, 313 U.S. at 106-07, 61 S.Ct. at 871-72, 85 L.Ed. 1214. The Court reasoned that Congress chose to authorize removal by only "defendant(s)" and not counterclaim-defendants because it drafted the term "defendant(s)" into 28 U.S.C. §71 knowing that the Supreme Court in *West* had previously construed the term as excluding a plaintiff/counterclaim-defendant.[5]

4. Act of Mr. 3 1887 ch. 373 §2, 24 Stat. 552, 553 (1887).

5. It is a well established principle of statutory interpretation that Congress is presumed to know the law and judicial interpretations of words used in statutes. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 792, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (noting the "presumption that Congress

(Cont'd)

See *Shamrock Oil*, 313 U.S. at 106-07 61 S.Ct. at 871-72, 85 L.Ed. 1214. This Supreme Court concluded that "if Congress intended to reject the construction this Court had placed" on the term "defendant(s)" in *West*, then "we can hardly suppose that it would have failed to use some appropriate language to express that intention." See *Shamrock Oil*, 313 U.S. at 107, 61 S.Ct. at 872, 85 L.Ed. 1214. The exact same reasoning applies in this case; if Congress wished to allow a counterclaim-defendant to remove a class action it could have used appropriate language to express that intention.

To get around the principle that Congress is presumed to know the state of the law that it seeks to amend, First Bank makes the argument that the legislative environment when Congress enacted CAFA is distinguishable from the legal environment when Congress previously amended the removal statutes during the time of *West* and *Shamrock*. First Bank argues that because Congress was expanding federal jurisdiction when it enacted CAFA, the courts should assume that this also included adding counterclaim-defendants to the realm of parties capable of removing a lawsuit to federal court. As Judge Easterbrook wrote:

> By using a word with an established meaning, Congress produces the established result. See, e.g., *Nken v. Holder*, — U.S. ——, 129

(Cont'd)
was aware of [prior] judicial interpretations [of a statute] and, in effect, adopted them"); and *United States v. Martin*, 128 F.3d 1188, 1192 (7th Cir. 1997) (in construing amendments to a statute, a court presumes that Congress was aware of judicial interpretations of the statute).

S.Ct. 1749, 1759, 173 L.Ed.2d 550 (2009); *Whitfield v. United States*, 543 U.S. 209, 216, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005). See also *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir.2005) (applying this approach to the 2005 Act). Giving legal words their standard legal meaning spares judges and lawyers expensive tours through the legislative history and avoids the impossible task of trying to guess what Members of Congress may have "had in mind" or "intended" about statutory language. See *Hor v. Gonzales*, 400 F.3d 482, 484-85 (7th Cir.2005). Doubtless First Bank is right to say that exempting counterclaims from § 1453 means that the 2005 Act achieves less than it otherwise would, but "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice-and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (emphasis in original). Congress enacted a *rule* allowing removal by "defendants"; it did not say anything similar to: "Courts may allow removal whenever the case involves a large, multi-state class action." See *First Bank*, 552 F.3d at 917-18.

It is clear from over a century of court precedence that the word "defendant(s)" in the removal context refers to the original named defendant(s). As this Supreme Court has stated "[w]e must not give jurisdictional statutes a more expansive interpretation than their text warrants . . ." *Exxon Mobil Corp. v. Allapattah Services,* 545 U.S. 546, 558, 125 S.Ct. 2611, 2620, 162 L.Ed.2d 502 (2005). Under the textualist approach, the plain meaning of the terms of a statute is to be applied without "speculat[ing] upon Congressional motives". *Reigel v. Medtronic, Inc.*,552 U.S. 312, 327, 128 S.Ct. 999, 1009, 169 L.Ed.2d 892 (2008). In applying CAFA, the Seventh Circuit Court of Appeals correctly followed a clear textual directive and held that §1453(b) does not change the common and understood meaning of the word "defendant" in the removal provisions.

First Bank's argument that the legal and legislative environment and policies that were key rationales for the Supreme Court's holding in *Shamrock* are somehow different than those leading to the passage of CAFA is misguided. Contrary to First Bank's argument, the Supreme Court's decisions in *West* and *Shamrock* were not based on ephemeral legal and legislative environment and policies, but were based upon the clear textual directive of the removal statutes and the judicially settled meaning of the term "defendant(s)" contained in the removal statutes. In addition, the Supreme Court in *Shamrock* relied upon the Congressional view that it was just and proper to require a plaintiff to abide by his selection of a forum. See *Shamrock Oil*, 313 U.S. at 106-07, 61 S.Ct. at 871-72, 85

L.Ed. 1214.[6] Although First Bank's Complaint pleads diversity jurisdiction, First Bank voluntarily filed its action in state court. Under the decisions of *West* and *Shamrock* and in accordance with the Congressional view, it is fair to require First Bank to abide by its selected forum.

First Bank, recognizing the weakness of its argument, attempts to ballast its argument with the "Findings" provision of CAFA. The references to CAFA "Findings" and the intent of Congress constitute pure speculation. The "Findings" provision of CAFA has been found not to be a clear textual directive for courts to alter or abolish long established principles of federal jurisdiction such as only an original defendant may remove. See *Morgan v. Gay,* 471 F.3d 469, 473 (3d Cir. 2006) (opining that courts should not consider CAFA's findings and purposes as evidence of Congress's intent to alter traditional rule of federal jurisdiction if there is no textual directive to do so). In the end the references to the CAFA "Findings" constitutes speculation on what Congress intended with CAFA. As the majority in *Palisades* appropriately put it:

> . . . although we are cognizant of the fact that Congress clearly wished to expand federal jurisdiction through CAFA, we also recognize that it is our duty, as a court of law, to interpret the statute as written, not to rewrite it as

6. The Court quoted the Congressional view from H.R. Rep. No. 1078 at 1 (1st Sess. 1887) wherein Congress echoed the Court's conclusion expressed in *West* that if a plaintiff "elects to sue in a State court when he might have brought his suit in a Federal court there would...be...no good reason to allow him to remove the cause."

> ATTM believes Congress *could have* intended to write it. If Congress intended to make the sweeping change in removal practice that ATTM suggests by altering the near-canonical rule that only a 'defendant' may remove and that 'defendant' in the context of removal means only the original defendant, it should have plainly indicated that intent. *Palisades*, 552 F.3d at 336.

When one considers that the word "defendant(s)" in removal context has been uniformly interpreted as original defendant(s) for over a century, the reality that Congress is presumed to know the judicial interpretation of "defendant", the fact that the text has meaning by eliminating the home state and unanimous consent of all defendants barriers to removal, and that Congress has drafted other removal statutes that clearly expand removal beyond just the original defendant(s), the logical conclusion is that if Congress intended to change the longstanding definition of "defendant(s)" in the removal context it would have done so in a clear and unequivocal text. To conclude otherwise is speculation as to what Congress intended.

B. There Is No Basis to Grant a *Writ of Certiorari*.

Petitioner acknowledges that the sole basis for this Supreme Court to grant its Petition for a *Writ of Certiorari* rests with Supreme Rule 10(c) which states: "A state court of United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

conflicts with relevant decisions of this Court." See Supreme Court Rule 10(c). In this case First Bank does not cite a contrary decision of any court to the Seventh Circuit opinion. As such the sole basis for granting the petition is that the issue presented represents ". . . important question of federal law that has not been, but should be, settled by this Court . . ." See Supreme Court Rule 10(c). Contrary to First Bank's assertion this matter does not raise an issue of national importance that has not been settled.

In its Petition for a *Writ of Certiorari* First Bank makes the argument that if the consensus opinion of the Circuit Courts of Appeals stands then a "loophole" to CAFA jurisdiction will be created and raises the specter that if original plaintiff/counterclaim-defendants are not permitted to remove counterclaims then CAFA jurisdiction will become meaningless. First Bank's argument is disingenuous as to its compulsion to file suit in state court and its argument that counterclaims will swallow CAFA jurisdiction is not borne out.

First Bank voluntarily elected to sue in state court in order to foreclose property and to collect on commercial guaranties. At all times there was complete diversity between First Bank and the defendants. As such First Bank could have chosen to file suit in federal court but elected to purse the action in state court. CAFA may be intended to increase access to federal courts in class actions but it does nothing to allow a bank to sue in one forum when it serves its purposes and remove the same case when the bank decides the forum no longer serves its purposes. Further, the specter of counterclaims swallowing CAFA jurisdiction is not reasonable. The only time when the counterclaim would

be applicable is an action wherein the counterclaim-defendant voluntarily elected to pursue a claim in state court as opposed to federal court. If the state court is good enough to sue to enforce one's right then it should be good enough to be sued. The vast majority of times the counterclaim defendant would have a choice of forum, i.e. state or federal.

Even with the specter of counterclaims swallowing CAFA, First Bank still needs some evidence on its side. Without evidence on its side First Bank engages in pure speculation. First Bank cites no empirical evidence for its assertion that counterclaims will swallow CAFA. This speculation cannot defeat the reality that Congress knew the judicial interpretation of the term "defendant" and adopted this definition when it drafted the term "defendant(s)" into §1453(b). See *Faragher v. City of Boca Raton*, 524 U.S. 775, 792, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (noting the "presumption that Congress was aware of [prior] judicial interpretations [of a statute] and, in effect, adopted them"). Even if there is evidence of counterclaims being used to evade CAFA that is an issue for the legislature and not for the courts to speculate as to the intent of Congress. The speculation engaged by First Bank is contrary to the historical fact that Congress has used different terms other than "defendant(s)" when it wanted to expand removal jurisdiction beyond the originally named defendant(s).[7] In this instance Congress had over a

7. See, e.g., *Shamrock* which discusses the substitution of the phrase "any party" for "defendant" when Congress expanded removal jurisdiction to include the plaintiff; See also, 28 U.S.C. §1452(a) (allowing "[a] party" to remove certain cases within the federal court's bankruptcy jurisdiction); 12 U.S.C. §1789(a)(2) (providing the Nat'l Credit Union Admin. Bd. the right to removal without regard to whether it is an original named defendant).

century of judicial interpretation of "defendant" in the removal provisions and failed to draft language to change that definition. To conclude that Congress, armed with that historical knowledge, really wanted to expand the definition of "defendant" in the removal provisions but failed to clearly do so in the text constitutes pure speculation.

CONCLUSION

The Seventh Circuit Court of Appeals did not err in holding that First Bank as a plaintiff/counterclaim defendant did not have the right to remove this matter to federal court. First Bank's Petition for a *Writ of Certiorari* should be denied.

Respectfully Submitted,

BERNARD YSURSA
Counsel of Record
12 West Lincoln Street
Belleville, Illinois 62220
618-235-3500
bjy@cooklawoffice.com

THOMAS R. YSURSA
5111 West Main Street
Belleville, Illinois 62226
618-235-0020

Counsel for Respondent, DJL Properties, LLC

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